Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-5822

CHARLES S. HAMPTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR PETITIONER

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CITATIONS TO OPINIONS BELOW

The December 11, 1974 opinion of the United States Court of Appeals for the Eighth Circuit is not yet reported and appears in the Appendix at page 107.

JURISDICTION

The judgment of the Court of Appeals was entered on December 11, 1974 (A. 106). The Petition for a Writ of Cer-

tiorari was filed January 10, 1975 and certiorari granted on March 31, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Whether due process forbids conviction of an accused for selling contraband, regardless of predisposition, when contraband illegally sold by the accused has been supplied by a government agent?

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States:

> No person shall be . . . deprived of life, liberty, or property without due process of law . . .

STATEMENT

The petitioner, Charles Hampton, was charged in a two-count indictment, with violations of Section 841(9)(1), Title 21, United States Code, to wit: knowingly and intentionally distributing a total of approximately three grams of heroin. Trial was held in the United States District Court for the Eastern District of Missouri before the Honorable John F. Nangle on May 6 and 7, 1974, resulting in a jury verdict of guilty as to both counts. (A. 2). On May 24, 1974, Hampton was sentenced to five years imprisonment and a three-year special parole term on each of the two counts. The imposition of sentence was suspended and Hampton was placed on probation for five years conditioned upon his remaining in the custody of the North Carolina prison

system during the period of his probation (A. 2). Hampton, during the dates covered in the indictment and up until the sentencing, had been an escaped prisoner from the North Carolina prison system and was returned there to serve the remainder of his sentence on state charges.

At trial, the government introduced the testimony of five witnesses in its case in chief and three witnesses in rebuttal. Only the testimony of three of the government's chief witnesses and one rebuttal witness is before this Court. Hampton, likewise, introduced the testimony of five witnesses including himself, but only his testimony appears in the record.

The first witness to testify for the government whose testimony is before the Court was Jule Hutton (A. 4). Hutton testified that he had known Charles Hampton and identified him in court. Hutton further testified that on the evening of February 25, 1974, he called Special Agent Terry Sawyer and told Sawyer that Hampton was willing to make a sale of a "foil" of heroin for $155.00 (A. 6). The telephone call had been placed from the Pud Tavern and further conversation led to an arranged meeting (A. 6-7). At approximately 9:00 P.M. Hampton left the tavern and returned approximately ten or fifteen minutes later stating that everything was all right (A. 7). Approximately two hours later, Hutton and Hampton left the tavern and walked to the predetermined rendezvous (A. 7-8). After a few minutes, Special Agents Sawyer and McDowell drove up to the corner and engaged Hutton in conversation (A. 7). Hampton and Hutton entered the vehicle and after a brief conversation, Hampton removed a hat he was wearing and took out a tinfoil package which he passed to Special Agent Sawyer (A. 8-9). Sawyer began to open the package and the contents began to spill out, whereupon Hampton retrieved the package, opened it, and returned it to Sawyer (A. 9). Sawyer then passed the package to Special Agent McDowell who tested it for purity (A. 10). After the test and a brief conversation

as to price and future transactions, Sawyer paid Hampton an undetermined amount of money (A. 10-11). After these transactions, Sawyer drove Hutton and Hampton to the vicinity of Kingshighway and Delmar Boulevards where they left the automobile (A. 12). The next day, February 26, 1974, Hutton was contacted by Hampton and was persuaded by Hampton to accompany him to another intersection (A. 12-13). After arriving at that location Hutton and Hampton met Special Agents Sawyer and McDowell in Sawyer's car (A. 13). After a brief conversation, Hampton again procured from his hat a small tinfoil packet which he gave to Sawyer who in turn gave to McDowell for testing (A. 13-14). Thereafter Hutton and Hampton were placed under arrest by McDowell.

On cross-examination, Hutton testified that he had known Hampton approximately three or four days after he had arrived in town (A. 15-16) and that he had met Hampton at the Pud Tavern. He testified that he had used the alias "James Gray" throughout his relation with Hampton (A. 16-17). He further testified that the initial conversation concerning drugs had been initiated by Hampton (A. 18). Hutton also testified that he had been a special employee of the United States government in the years 1961 to 1965 and again from 1972 to the time of trial (A. 20). During that time Hutton testified that he had participated in approximately 80 or 90 narcotics cases as a special employee in Omaha, Nebraska, Wichita, Kansas, and St. Louis, Missouri (A. 20).

The next witnesses to testify were Special Agents Terry C. Sawyer and James D. McDowell (A. 27, 44). Their testimony generally corroborated the above stated testimony of Jule Hutton with reference to the times that Sawyer, McDowell, Hutton and Hampton were together (A. 27-57).

Thereafter, the petitioner called four witnesses, whose testimony is not set out in the record. The last defense witness to

testify was Hampton himself (A. 58). Hampton testified that soon after he arrived in St. Louis with his common-law wife and four year old son, he settled into an apartment building near the scene of the drug sales. Nearby in the neighborhood was the Pud Bar and Grille. At the Pud, a man who introduced himself as "James Gray" struck up his acquaintance (A. 63). Soon he and "Gray" became close friends, based on their mutual acquaintances in Chicago and their skill at playing pool (A. 63). Hampton was to later learn that "James Gray" was in reality, Jule Hutton, a special employee of the Drug Enforcement Administration of the government.

Hampton further testified that, Hutton, aware that he and his family were in serious financial straits, proposed a plan whereby they could both make some clean money (A. 64). Under this plan, Hampton testified, Hutton would obtain a quantity of counterfeit narcotics for sale to some supposedly gullible acquaintance of Hutton's in town from Colorado (A. 65). This substance would be obtained, Hutton told Hampton, from a friend of Hutton's who worked in a pharmacy (A. 65), and the substance thus obtained would simulate heroin in every apparent respect (A. 65, 66, 67, 68, 70, 76, 77).

Hampton testified that Hutton did subsequently deliver such a substance to him on or about February 25, 1974. At that time, Hampton testified, Hutton handed him a foil-wrapped package containing the substance that he soon after sold to Special Agent Sawyer (A. 71-73). During the transaction on February 25, 1974 Special Agents Sawyer and McDowell initiated the arrangements for another such transaction, to be consummated the following night, February 26, 1974 (A. 73).

Hampton testified that again, on February 26, Jule Hutton delivered to him a quantity of a substance that he sold later that evening to Special Agent Sawyer (A. 77-78). At that time, Hampton testified, Hutton delivered two small tinfoil packets to

him at Hutton's apartment (A. 78). Both Hutton and Hampton participated in the preparation of one large package of the substance from the two small tinfoil packets (A. 78). Hampton sifted the mixture through a nylon stocking, and Hutton wrapped the substance in tinfoil (A. 78). Again, Hutton testified that the substance he sold to Agent Sawyer on February 26, was the substance delivered to him by Hutton earlier in the day (A. 78).

On the government's rebuttal, Jule Hutton again took the stand and testified that at all times Hampton initiated and instigated the idea of selling heroin (A. 89-90) and that at no time did he give Hampton any substance or money (A. 91).

In chambers after closing arguments, the defense moved for a "special jury instruction on the defense of entrapment" (A. 95). This motion was denied, and the court gave the jury no instruction whatsoever on entrapment (A. 95-96).

At the close of all evidence, the cause was submitted to the jury (A. 103-104). After deliberation, the jury returned verdicts of guilty as to both counts (A. 2).

On appeal to the Court of Appeals for the Eighth Circuit, the court affirmed the judgment of the district court, finding no error in that court's refusal to give Hampton's requested instruction on entrapment.

SUMMARY OF ARGUMENT

This case presents a new problem that this court has not passed upon. The problem is: to what extent this court will sanction the activities of government law enforcement agents in creating crimes, in providing the very contraband without which there could be no crime. Three prior decisions of this court, *Sorrells, Sherman,* and *Russell, infra,* do not answer the problem

because they were concerned with the historic embodiment of entrapment, solicitation or inducement. The majority opinions in these cases focused on the intent or predisposition of the defendant to commit a crime, when what the government agent did was to provide the opportunity to do what the defendant already could do by himself. The instant situation involves the government far further in crime to the point of completing the link between the defendant's predisposition, and the completed crime by supplying the necessary element of the crime, the very contraband without which all of the petitioner's desires to commit a crime would be insufficient.

This court has condemned the government's soliciting crime when such activity starts with the government; it must, consistently, deny the government the right to prosecute when agents go further than solicitation and provide the contraband without which there could be no crime to prosecute.

The ground on which petitioner relies for asking this court to bar his prosecution is the due process clause of the Fifth Amendment. It is asserted that due process is violated in two ways when the government supplies contraband to the defendant.

First, there is necessarily an implied presumption relied on by the government to justify its conduct, that an individual predisposed to commit a contraband crime could and would have obtained the contraband on his own, without government intervention. It is this implied presumption that is at the heart of petitioner's due process attack. This court in a number of cases has placed due process limitations on the creation and effect of certain presumptions used by government. Although the decided cases to date have dealt only with statutory presumptions regarding criminal conduct, clearly due process limitations apply to any presumption on which the government relies. The basic test is that a presumption in a criminal context cannot be sustained if the relation between the proved fact and the ultimate

fact presumed does not exist beyond a reasonable doubt. Applying this test to the instant case, when the government supplies the contraband, the likelihood that the predisposed defendants would have committed a crime involving the contraband can never be proven beyond a reasonable doubt, since the contraband might have been totally unavailable to him from any other source.

The second way in which due process is violated by the government's supply of contraband to the accused is based on the proposition that the government has no legitimate interest in punishing a predisposed individual unless he has harmed another individual or society at large. Where the government has supplied the contraband to the defendant it has controlled the commission of the offense in such a manner that society is not harmed by the defendant's criminal act. Moreover, in exceeding the bounds of a legitimate governmental interest in supplying the *sine qua non* of the offense, conviction of the defendant is brought about by a method of law enforcement that offends a general sense of justice where law enforcement methods have exceeded certain decencies of civilized conduct, due process has historically been a bar to a prosecution arising out of that conduct.

ARGUMENT

I. The Trial Court Erred in Refusing to Instruct the Jury on the Defense of Entrapment as Requested, Because the Due Process Clause of the Fifth Amendment Forbids the Conviction of an Accused for Selling Contraband, if the Contraband Sold Was Supplied to the Accused by the Government.

A. Prior decisions by this court on the defense of entrapment do not preclude an examination of the issue raised in the instant case.

Hampton's proposed instruction on entrapment was not given to the jury by the district court as requested. It reads in relevant part:

> The defendant asserts that he was a victim of entrapment as to the crimes charged in the indictment.
>
> If you find that the defendant's sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.
>
> Furthermore, under this particular defense, you need not consider the predisposition of the defendant to commit the offenses charged, because if the governmental involvement through its informer reached the point that I have just defined in your own minds, then the predisposition of the defendant would not matter.
>
> * * * * * * *

Hampton's proposed instruction is based on what has been termed the "Government Conduct Theory" of entrapment which has its origins in the separate opinion of Mr. Justice Roberts

for himself and two other justices in *Sorrells v. United States*, 287 U.S. 435 (1932) and the concurring opinion of Mr. Justice Frankfurter for himself and three other justices, in *Sherman v. United States*, 356 U.S. 369 (1958). Prior to this court's recent decision in *United States v. Russell*, 411 U.S. 423 (1973), *Sorrells* and *Sherman* were the only two decisions of this Court dealing with the theory of entrapment in the federal courts.

In *Sorrells, supra*, the defendant was charged with selling one half-gallon of whiskey in violation of the National Prohibition Act. A government agent had visited *Sorrells*, reminisced about their experiences in the same division during World War I, and after three requests, was sold a half-gallon of whiskey. *Sorrells* request for a jury charge on entrapment was denied by the trial judge.

This Court reversed the conviction and ordered a new trial. In an opinion written by Mr. Chief Justice Hughes, the majority framed an entrapment defense prompted by improper governmental conduct but available only to "otherwise innocent persons." The defense was based on an unexpressed intent of Congress to exclude from its criminal statutes the injustice that conviction of entrapped "innocents" would accomplish. Regardless of the nature and extent of the governmental activity the Court held, there is no entrapment if the defendant has the "predisposition" to commit the crime or if the "criminal design" originates with the defendant.

On the other hand, Mr. Justice Roberts, concurring in *Sorrells*, believed the true basis of entrapment was analogous to the equitable and civil law doctrine that courts should not "tolerate the use of their process to consummate a wrong" (287 U. S. at 455) (Roberts, J., concurring). Conviction of an entrapped defendant should be barred to protect the court's function of administering justice under its view. Thus, while Mr. Justice Roberts said that entrapment occurs "where a law

officer envisages a crime, plans it and activates its commission by one not theretofore intending its perpetration," he felt evidence of the accused's predisposition was a "false issue." (*Id.* at 454, 458). Once a defendant proved entrapment through inducement or instigation to commit the offense, Mr. Justice Roberts argued that it was the duty of the court to release the defendant immediately (*Id.* at 457). Mr. Justice Roberts' analysis thus required a determination of causation although he felt only police conduct should be examined.

In *Sherman* which presented this Court's next opportunity to review the entrapment defense, the facts were that the defendant and an agent met at a doctor's office where they were both being treated for drug addiction. After first refusing, Sherman secured some heroin for the agent and himself. Mr. Chief Justice Warren, writing for a majority of five, held there was entrapment as a matter of law, but specifically refused to reconsider *Sorrells* because the issues were not raised below or argued before the Court. The crucial questions—the basis for the doctrine and whether the focus is the government conduct alone or includes an evaluation of the individual defendant—were specifically left open by the Court.

Mr. Justice Frankfurter, however, in his concurring opinion in *Sherman* analyzed the entrapment doctrine basically in the same manner as Mr. Justice Roberts in *Sorrells*. He felt that the only true Congressional intent to be derived from a reading of a statute "is . . . to make criminal precisely the conduct in which the defendant has engaged" (356 U.S. at 379) (Frankfurter, J., concurring). And like Mr. Justice Roberts he believed that the reason why an entrapped defendant is freed is the judiciary's supervision of the administration of criminal justice in the federal courts, not the fact that the conduct was not criminal in a statutory sense (*Id.* at 380). Also like Mr. Justice Roberts, Mr. Justice Frankfurter believed that a determination of an accused's predisposition was irrelevant to the

question of entrapment and highly prejudicial to the defendant. His test to determine whether the government's conduct amounted to an entrapment was objective. Under his view, activity that encouraged the commission of a crime by a person other than one ready and willing to commit it was beyond the scope of proper governmental power and therefore constituted entrapment (*Id.* at 383-84).

Mr. Justice Frankfurter's sound and vigorous argument notwithstanding, the majority opinion in *Sherman* reiterated the dominant view to be followed by the majority of lower federal court decisions. See e.g., *Pierce v. United States*, 414 F.2d 163 (5th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969); *United States v. Pugliese*, 346 F. 2d 861 (2d Cir. 1965); *United States ex rel. Hall v. Illinois*, 329 F. 2d 354 (7th Cir. 1964); *Gorin v. United States*, 313 F. 2d 641 (1st Cir. 1963). Having found sufficient evidence to infer predisposition, the courts generally avoided further inquiry into the propriety of government law enforcement conduct.

However, a marked departure from the norm occurred in a growing minority of federal cases. In these cases the courts involved allow entrapment as a defense despite the defendant's predisposition. Where the government's conduct consisted of supplying contraband to the accused, said contraband being the subject of the offense, every court that passed on the question prior to this Court's decision in *United States v. Russell, supra*, considered this entrapment as a matter of law, disregarding the predisposition of the defendant to commit the offense charged. *See, e.g., Green v. United States*, 454 F. 2d 783 (9th Cir. 1971); *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973); *United States v. Dillett*, 254 F. Supp. 980 (S.D.N.Y. 1966); *United States v. Chisum*, 312 F. Supp. 1307 (C.D.Cal. 1970). Additionally the decisions of several state courts adopted this view. *See e.g., State v. Boccelli*, 105 Ariz. 405, 467 P. 2d 740 (1970); *State v. Powell*, 181 S.E.2d 754 (N.C. App. 1971).

In 1973, in *United States v. Russell, supra*, this court was presented its third opportunity to review the theoretical underpinnings of the entrapment doctrine in the federal courts. Two major issues were considered: first, whether a finding of predisposition is dispositive of the entrapment defense; and second, if predisposition has been established, whether there remains an alternative basis for judicially limiting police inducement of criminal conduct.

The defendant in *Russell* was convicted of illegally manufacturing, processing, and selling a depressant or stimulant drug. He had been approached by a special agent of the Federal Bureau of Narcotics and Dangerous Drugs, who claimed to represent an organization seeking to control the illicit manufacture and distribution of methamphetamine on the Pacific coast. The manufacture of methamphetamine commonly known as "speed" requires as an essential ingredient a substance known as phenyl-2-propanone. At the time of the defendant's alleged violation, propanone was legal to manufacture, sell, and possess, but its purchase required a manufacturer's license. Its only use was as an ingredient for the manufacture of "speed." At the request of the Bureau of Narcotics and Dangerous Drugs, most suppliers had agreed voluntarily to discontinue its sale. The ingredient was therefore extremely difficult to obtain, legally or illegally. Shapiro, the agent who approached the defendant, offered to supply him with propanone in return for half of the "speed" to be produced from the propanone by the defendant. Shapiro, in fact, furnished one hundred grams of propanone, received half the product, and purchased part of the remaining half. About a month later, Shapiro returned to the premises where the manufacture had taken place and asked the defendant's accomplice whether they could continue the arrangement. The accomplice said he had obtained two additional bottles of propanone, but would be interested in further transactions with Shapiro when they were depleted. The accomplice then provided Shapiro with more "speed." Three days later Shapiro re-

turned with a search warrant and seized an empty 500 gram propanone bottle and a 100 gram bottle partially filled with the chemical, neither bottle being the one the agent had earlier provided.

The Court of Appeals for the Ninth Circuit overturned Russell's conviction taking the view that reversal was required regardless of whether one characterized overreaching government conduct as the gravamen of the entrapment defense or as an alternative defense. *United States v. Russell*, 459 F.2d 671 (9th Cir. 1972), *rev'd* 411 U.S. 423 (1973). The Ninth Circuit held that the "hopefully unique" conduct of Agent Shapiro was repugnant to the criminal justice system, violated fundamental concepts of due process, and amounted to the kind of overzealous law enforcement conduct which Mr. Justice Frankfurter had sought to prevent in *Sherman* (*Id.* at 673-74).

This Court, in a five to four decision, reversed the court of appeals. Writing for the majority, Mr. Justice Rehnquist noted the recurring conflict, first engendered by the Hughes-Roberts dichotomy in *Sorrells* as to whether the proper focus of an entrapment inquiry is the predisposition of the defendant or the government instigation of the crime. He concluded that, while the majority views in *Sorrells* and *Sherman* had been subjected to criticism for their logical and procedural shortcomings, those 2 cases had themselves conclusively responded to those criticisms. 411 U.S. at 433-434. Furthermore, he stated that the arguments supporting the minority view were found subject to "at least equally cogent criticism." *Id.* at 434. He stated, therefore, that entrapment is, as the previous lead cases had established, a "relatively limited defense," one designed to curb excessive government conduct, but to carry out the intent of Congress as Mr. Chief Justice Hughes had described it. *Id.* at 435.

Mr. Justice Rehnquist then turned to the independent defense accepted in *Greene, supra*, which the court of appeals had suggested was essentially the same as the entrapment defense because both were "based on fundamental concepts of due process and [evinced] the reluctance of the judiciary to countenance 'overzealous law enforcement' " 459 F.2d at 679, *cited* in *United States v. Russell*, 411 U.S. 423, 428 (1973). In rejecting the argument that government provision of a non-available, essential element to the production of a contraband product constitutes a per se denial of due process, the Court indicated that its main reason for doing so was because the facts of *Russell* indicated that the bottles of propanone seized by Shapiro pursuant to his warrant established that the defendant had a source of the chemical independent of the government (*Id.* at 431). Thus, in the Court's view, Shapiro merely provided the chemical to an enterprise already in progress, prompting the Court to state, ". . . The law enforcement conduct here stops far short of violating that fundamental fairness, shocking to the universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment (*Id.* at 432).

Hence, despite the actual holding in *Russell*, this Court specifically recognized that in an appropriate case, due process may bar a criminal prosecution, stating:

> . . . we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . .

The instant case, therefore presents a fundamental and exceedingly important question of policy and justice and is a case of first impression for this court. To what extent will the courts sanction the activities of government law enforcement

agents in creating crimes by providing the contraband without which there could be no crime? The court of appeals below took the position that it was foreclosed from considering this question by *Russell*. On the other hand, the Fifth Circuit has reaffirmed its pre-*Russell* position that ". . . a defendant, where entrapment is an issue may be acquitted . . . even though disposed, where the undercover agent supplies him with the contraband," *United States v. Mosley*, 496 F.2d 1012, 1016 (5th Cir. 1974); *United States v. Oguendo*, 490 F.2d 161 (5th Cir. 1974). *Russell* does not reach this issue because as previously stated, there a government agent merely provided some narcotics manufacturers with a necessary ingredient which, although difficult to obtain, was legal to possess and which had in fact been obtained independently by the defendant. In the case at bar, however, Hampton's testimony, if true, showed that the government was involved in the crime to the point of supplying the heroin itself, without which any desire on Hampton's part to commit the subject offense would be insufficient.

B. The government's supply of contraband to the accused is a contributing cause of the accused's criminal act of such magnitude that it can never be determined fairly within bonds of due process whether the accused would have obtained and sold such contraband without the government's intervention.

In the instant case, Hampton through his testimony raised the issue that the government manufactured the crime by supplying the controlled substances. Indeed, there was no evidence adduced at trial on behalf of the government to indicate where or how Hampton could have obtained the alleged heroin. The inability to acquire such a drug would clearly have deterred him from becoming involved in the criminal venture. As this court stated explicitly in *Sherman*, "The function of law enforcement

is the prevention of crime and the apprehension of criminals. Manifestly that function does not include the manufacturing of crime." 356 U.S. at 372.

Thus it is Hampton's primary contention that the correct way to analyze the problem in this case is not to regard it as an entrapment case at all, but to question whether he received due process by the acts of the government agent in providing him with the very contraband he is prosecuted for selling.

The cases of entrapment, heretofore considered by this Court, culminating with *Russell*, have been limited to the question of solicitation or inducement. The situation at bar is considerably different and requires a different analysis. In the solicitation cases, the governmental function involves inducing the accused to do what he was not previously disposed to do. Yet, in this case, assuming the accused did have the intent to commit the acts, Hampton's testimony indicates that the government went far further than providing him with the opportunity to do the acts—the government agent provided Hampton with the very illegal substances without which there would be no crimes with which to charge him. The United States government, acting through its employee, has literally created a crime because it provided the missing link between whatever intent he arguably had to commit a crime and the ability to carry out that desire. It is this conduct which Hampton asks this Court to condemn. It is Hampton's position that there is both a qualitative difference between solicitation and the type of conduct that his testimony alleges occurred.

Petitioner believes that the cases previously cited and upon which he relies. *United States v. Bueno, Greene v. United States, United States v. Chisum, United States v. Dillet*, and *State v. Bocelli, supra*, can best be analyzed if they are considered from the due process point of view, rather than attempting to fit them into the entrapment doctrine and, if that is true, there are several lines of cases that support this contention.

The most relevant body of law deals with constitutional limitations on the creation and effect of certain presumptions. In *Tot v. United States*, 319 U.S. 463 (1943) this court stated the basic tests to be used in determining the constitutionality of statutory presumptions in criminal laws. In *Tot*, the defendants were convicted under a provision of the Federal Firearms Act that made it "unlawful for any person convicted of a crime of violence . . . to receive any firearm . . . which [had] been shipped . . . in interstate . . . commerce" and further provided that "the possession of a firearm . . . by any such person [is] presumptive evidence that such firearm . . . was . . . received by such person in violation of [the] Act." 319 U.S. at 464. In holding that the presumption violated due process, this court stated that "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Id.* at 467-68. The Court noted that, although state laws might make acquisition difficult, it did not follow from proof of mere possession that the firearms must have been received by the defendants in interstate, as opposed to intrastate, commerce subsequent to the adoption of the federal statute. *Id.* at 468.

In a later case, *Turner v. United States*, 396 U.S. 348 (1970), this court appears to have gone beyond the requirement that the proved fact must tend to prove the presumed fact rationally. It seems to have adopted the standard that the presumed fact must actually exist beyond a reasonable doubt. See C. McCormick, Evidence § 344 at 816 (2d ed. 1972); Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 Duke L. J. 919, 923-24. Although the decided cases to date have dealt only with statutory presumptions, one noted authority is clearly of the opinion that "theoretically due process problems may arise with regard to any presumption

[upon which the state relies] . . ." C. McCormick, *supra*, note 93, § 344 at 811.

The instant case presents a situation highly analogous to *Tot* and its progeny. Probably the only rationale that can be offered by the government for the practice of supplying contraband that is the *sina qua non* of the offense to the accused, is the existence of a high probability that the accused would commit a similar offense in the future. Under this view, the supply of contraband to the accused is justified by his alleged criminal propensity to commit a crime involving the contraband. However, petitioner submits, that when the government supplies the contraband, the likelihood that the defendant would commit the crime cannot be known or established within the bounds of rationality established in *Tot*. Certainly it does not follow as a matter of logic that one predisposed to commit a crime involving contraband will do so if the contraband is otherwise totally unavailable to him, or if he might encounter extreme difficulty in obtaining it. And certainly such a presumption does not exist beyond a reasonable doubt as is required by *Turner, supra.* To a limited extent the government may prescribe potential criminality, but this area of governmental power has narrow limits. *Scales v. United States*, 367 U.S. 203, 224-25 (1961). And as one commentator has noted, "At the present time, scientific methods are too unreliable to ascertain criminal propensity and 'dangerousness' with sufficient accuracy to meet the test of due process." Comment, *The Defense of Entrapment: A Plea for Constitutional Standards*, 20 Fla. L.R. 63, 72 (1967).

In a strictly different context this same point was made by Mr. Justice Jackson as Circuit Judge in granting bail to convicted Communists who were awaiting decision on a petition for *certiorari*:

> If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional Amer-

ican law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted. ***Williamson v. United States,*** 184 F.2d 280 (2d Cir. 1950).

Clearly, for the government to supply contraband makes it all but impossible to determine whether a given defendant would have sold it without the official source of supply and the fact that he may have been predisposed to commit the offense is not a sufficient link in the causal chain leading to the completed offense from which to draw such an inference fairly, within the bounds of due process.

C. **By supplying contraband that is the subject of the offense, the government acts outside the scope of any legitimate government interest and offends a community sense of fair play and decency so as to violate due process.**

Any law enforcement practice that goes beyond solicitation to the extent of supplying an indispensable and illegal element of crime, not otherwise available to an accused, is a violation of due process, because the due process clause permits deprivation of liberty only in order to accomplish a legitimate objective of society. *See West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 636 (1943). Even though an accused may be predisposed to commit a particular offense, there is no governmental interest in punishing him because of his moral guilt unless he has harmed another individual or society at large. Since a solicited contraband offense in which the government has supplied the contraband is contrived and

controlled by the law enforcement authorities, it is difficult to see how it could be harmful to society.

An examinaiton of the policies which lie behind the defense of entrapment, as it has been recognized by this Court, illuminates the policies underlying the decisions of the other courts that have passed on this precise issue. The courts permit agents of the government to offer to a suspected person an opportunity to commit a crime, because otherwise many crimes, especially those involving contraband, could not otherwise be detected. The government has an interest only in apprehending those engaged in criminal activity by the mere offer of a neutral opportunity (*see Sorrells v. United States,* 287 U.S. 435, 441), not in the "manufacturing of crime." *Lopez v. United States,* 373 U.S. 427, 434 (1963). There is no governmental interest in intervening in contraband trade in such a way as to obtain any result other than an arrest based upon an opportunity. If the government supplies the contraband, then it is not acting within the bounds of its legitimate interest. As a matter of logic, supplying the contraband exceeds the bounds of that interest.

Thus, by exceeding the bounds of a legitimate governmental interest in supplying contraband that is the *sine qua non* of the offense, it would appear that conviction will be brought about through a method of law enforcement that offends a general sense of justice. In such an instance, the government has engaged in conduct that is expressly criminal, and would no doubt support a charge of conspiracy against government agents if they were acting in any other capacity. In *Rochin v. California,* 342 U.S. 165 (1952). This court concluded that the due process clause embodies the heritage of a legal tradition "so rooted in the . . . conscience of our people as to be ranked as fundamental," requiring that prosecutorial efforts respect certain decenies of civilized conduct. *Id.* at 169, 173. Law enforcement officials under the view expressed in *Rochin,* must conduct themselves within the confines of a "community sense of fair play and de-

cency," stopping short of actions which "discredit law," "brutalize the temper of a society," or shock the conscience of justice. *Id.* at 174, 172.

The evils that are sanctioned should this type of procedure be allowed wherein the government supplies contraband to an accused and then obtains a conviction based upon that contraband, promotes disobedience of the laws in order to punish, encourages law enforcement officials to participate in crimes, permits unrestricted ability of overzealous law enforcement agents selectively to set up defendants for prosecution, and ultimately results in a sham trial because the evidence has already been provided by the prosecution. Most assuredly, these evils result in an affront to basic notions of justice in violation of due process.

CONCLUSION

Petitioner contends that the decision of the Court of Appeals for the Eighth Circuit affirming his conviction should be reversed. Due process forbids Hampton's conviction in this instance if his version of the facts is true, and the jury should have been so instructed. This case should be remanded to the court of appeals with instructions to order the district court to grant Hampton a new trial.

Respectfully submitted

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